

THE OBLIGATION NOT TO ARBITRARILY REFUSE INTERNATIONAL DISASTER RELIEF: A QUESTION OF SOVEREIGNTY

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In May 2008 Cyclone Nargis struck the coast of Myanmar with devastating force. Within days it became clear that the country's military regime was either unable or unwilling to respond to the disaster and it is estimated that up to 150 000 people were killed with 2.4 million internally displaced. Fearing foreign political interference or domestic backlash, the regime initially refused all offers of international humanitarian assistance, leading many to question whether states should be allowed to refuse international disaster relief when it denies their citizens the right to life. This article advocates the convening of a multilateral treaty that would oblige states not to arbitrarily refuse international disaster relief. Since the fall of the International Relief Union in the late 1930s, international disaster law has been characterised by inadequate codification, inconsistent state practice and non-binding guidelines. The lack of certainty in the provision, acceptance and termination of international aid has left affected states vulnerable to the political motivations of assisting actors and ultimately powerless to control the facilitation of aid on their own territories. The result is that states will often refuse aid irrespective of humanitarian need due to fears of unwanted political interference or a loss of domestic political legitimacy. This article acknowledges this reality and, building on the work of the International Law Commission's 'Protection of Persons in the Event of Disasters', provides several novel arguments on how ratifying a treaty on international disaster relief would be in the interest of affected states by enhancing their sovereign control of the relief effort and bolstering their domestic political legitimacy to govern.

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I INTRODUCTION

In early May 2008, Cyclone Nargis, ‘the third deadliest storm ever recorded at a global level’,¹ struck the coast of Myanmar with wind speeds exceeding 200 km/h.² The damage was swift and devastating. Despite a lack of official statistics, it is estimated that up to 150 000 people died and 2.4 million were directly affected through displacement, homelessness or injury.³ In the worst hit Ayeyarwady (formerly Irrawaddy) region, over 50 per cent of schools and 75 per cent of health facilities were either destroyed or damaged.⁴ The cyclone flattened over 700 000 homes and severely affected national food supplies, leading to an undeniable need for international assistance.⁵ And yet, fearing further condemnation and foreign political interference, the then military dictatorship of Myanmar initially refused all offers of international humanitarian assistance.⁶

Myanmar’s decision to preference political power over the humanitarian needs of its citizens reignited debate over the apparent conflict between a sovereign right to refuse assistance and a right to receive humanitarian relief in the context of a natural disaster. Political organisations and academics alike questioned the absence of legal mechanisms through which international disaster relief could be regulated to discourage states from arbitrarily refusing assistance,

¹ Robert Turner et al, ‘Inter-Agency Real Time Evaluation of the Response to Cyclone Nargis’ (Report, Inter Agency Standing Committee, 17 December 2008) 10 <<http://perma.cc/GE4B-VQ3V>>.

² Emergency Assistance Team and the Centre for Public Health and Human Rights at the John Hopkins Bloomberg School of Public Health, ‘After the Storm: Voices from the Delta’ (Report, May 2009) 13 <<http://perma.cc/A4K7-RCST>>.

³ Nathan Willis, ‘Natural Disaster, National Sovereignty and State Negligence: An International Law Analysis of the Denial of Emergency Relief after Cyclone Nargis in Myanmar (Burma)’ (2012) 31 *University of Tasmania Law Review* 134, 139.

⁴ *Ibid.*

⁵ Andrew Selth, ‘Even Paranoids Have Enemies: Cyclone Nargis and Myanmar’s Fears of Invasion’ (2008) 30 *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 379, 386.

⁶ J Benton Heath, ‘Disasters, Relief, and Neglect: The Duty to Accept Humanitarian Assistance and the Work of the International Law Commission’ (2011) 43 *New York University Journal of International Law and Politics* 419, 420–1.

while maintaining the affected state's right to sovereignty and territorial integrity.⁷ Many argued that the principle of sovereignty should not permit states to arbitrarily deprive their citizens of the right to life.⁸ Some contended that Myanmar's neglect was a crime against humanity that justified forcible humanitarian intervention through the Responsibility to Protect ('R2P') doctrine.⁹ While such inflammatory language has predominantly disappeared from the discourse surrounding the law of international disaster relief, with the majority of states and the United Nations Secretary-General declaring R2P wholly inapplicable in the context of a natural disaster, two fundamental questions remain unanswered:

1. Why do states refuse humanitarian assistance when a disaster exceeds their domestic capacity; and
2. Should states be under a binding legal obligation not to arbitrarily refuse such assistance when they are clearly unable or unwilling to respond to the needs of disaster victims on their territory?

In answering these questions, this article advocates for the convening of a multilateral treaty that would oblige states not to arbitrarily refuse international humanitarian assistance when a disaster overwhelms its domestic capacity. Since 2007, the UN International Law Commission ('ILC') has produced 21 draft articles on the 'Protection of Persons in the Event of Disasters' ('Draft Articles'),¹⁰ ranging from the role of the affected state in coordinating an international disaster response to the recognition of human rights in the context of a natural disaster. It submitted that these Draft Articles provide an ideal platform for states to begin negotiations for a multilateral treaty on the law of international disaster relief, and this article seeks to make practical contribution to this process.

Part II highlights the fractured development of international disaster law and the apparent tension between the human rights of disaster victims and the sovereignty of the affected state. It is argued that the lack of a codified legal system and unified state practice has meant that international disaster relief often takes place on an ad hoc and unpredictable basis, leaving no legal certainty for the disaster-affected state or its citizens.¹¹

Part III argues that in order to overcome this, the ILC should convene a treaty on international disaster law that includes the obligation not to arbitrarily refuse international disaster relief. Given the plethora of non-binding guidelines and UN General Assembly resolutions, it is submitted that a treaty-based obligation

⁷ Ibid 427, 469.

⁸ Willis, above n 3, 150.

⁹ Stuart Ford, 'Is the Failure to Respond Appropriately to a Natural Disaster a Crime against Humanity? The Responsibility to Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nargis' (2010) 38 *Denver Journal of International Law & Policy* 227, 235.

¹⁰ See generally International Law Commission, *Report of the International Law Commission on the Work of Its Sixty-Sixth Session*, UN GAOR, 69th sess, Supp No 10, UN Doc A/69/10 (5 May–6 June and 7 July–8 August 2014) ch V(C) ('*Report of the ILC Sixty-Sixth Session*').

¹¹ David Fisher, 'Law and Legal Issues in International Disaster Response: A Desk Study' (Report, International Federation of the Red Cross and Red Crescent Societies, 2007) 8 <<http://perma.cc/64AD-AXLG>>.

would be the most effective means of encouraging states not to arbitrarily refuse international disaster relief by strengthening their own domestic capacity to facilitate and coordinate international humanitarian assistance when required.

Part IV proposes two main reasons why states refuse international humanitarian assistance despite its objective necessity: (i) a fear that international aid will be used as a pretext for political interference in their internal affairs; and (ii) a fear that accepting aid will be perceived by the domestic population as political weakness or incompetence. It is argued that a treaty-based obligation not to arbitrarily refuse international disaster relief could overcome these problems by providing legal checks and balances on the provision of international disaster relief and ensuring that the affected state maintains the primary role in the coordination of the relief effort.

Part V demonstrates how this obligation could work in practice. It argues that in order to balance the sovereignty of the affected state with the rights of disaster victims, the following clauses must be included: (i) a working definition of what constitutes an arbitrary refusal; (ii) placing the burden of proving arbitrariness on the assisting actor; (iii) giving the affected state the right to unilateral termination; and (iv) limiting the consequences of an arbitrary refusal to the commission of an internationally wrongful act so that under no circumstances is the territorial integrity of the affected state under threat.

The final Part looks at how the implementation of domestic and international compliance mechanisms could help ensure that the obligation not to arbitrarily refuse international disaster relief is complied with as a matter of practice, thereby demonstrating an organised, responsible and proactive government that is capable of protecting its citizens in the event of a disaster.

A multilateral treaty that obliges states not to arbitrarily refuse international disaster relief could be an expression, not a limit, on the sovereign equality of its signatories and one that would promote international cooperation in responding to the needs of disaster victims worldwide.

II BALANCING SOVEREIGNTY WITH THE RIGHTS OF DISASTER VICTIMS: A LEGAL AND HISTORICAL BACKGROUND

A *The State of International Disaster Law*

International disaster law is described as existing in a state of ‘unsystematic state practice, partial codification, and best practices guidance documents’.¹² Its effectiveness is therefore ‘hampered by: its dispersed nature; the lack of awareness and implementation’, leaving ‘important gaps in its scope and coverage’.¹³ The result is that international disaster relief is conducted on an ad hoc and unpredictable basis. The generosity of assisting states is often determined by political motivations or the extent to which the disaster is covered by the media, while receiving states have at times refused such assistance for fear that it will lead to unwanted interference in their internal affairs.¹⁴

¹² Michael J Kelly, ‘Introduction’ in David D Caron, Michael J Kelly and Anastasia Telesetsky (eds), *The International Law of Disaster Relief* (Cambridge University Press, 2014) 1, 1.

¹³ Fisher, above n 11, 15.

¹⁴ Selth, above n 5, 380.

There have been various attempts to improve the administrative and practical coordination of international disaster relief through such bodies and documents as the International Search and Rescue Advisory Group, the International Federation of Red Cross and Red Crescent Societies' ('IFRC') Code of Conduct and the Office for the Coordination of Humanitarian Affairs, whose functions are discharged by the Interagency Standing Committee and chaired by the Emergency Relief Coordinator. The importance of this process was highlighted by UN General Assembly *Resolution 46/182*,¹⁵ which adopted guiding principles to improve the effectiveness of the international community's ability to prevent and respond to natural disasters. Notwithstanding these developments, there is a distinct lack of an overarching legal framework within which the more nuanced questions of sovereignty and human rights can be resolved in the context of disasters.

There has only been one attempt to systematically coordinate and codify international disaster relief and it proved unsuccessful. In 1922, the League of Nations adopted a proposal from the then President of the Italian Red Cross Society to form an intergovernmental organisation to oversee the coordination of international disaster relief.¹⁶ After several years of negotiation, a 43-state conference established the International Relief Union ('IRU'), which declared that its objective was to mobilise states 'to render aid to each other in disasters, to encourage international relief by a methodical co-ordination of available resources, and to further the progress of international law in this field'.¹⁷ Entering into force in 1932, the agreement establishing the IRU was ratified by 30 states but managed only two disaster relief efforts before its effective demise in the late 1930s.¹⁸

The failure of the IRU was in part attributable to the Great Depression of the 1930s and the growing instability and isolationism in international affairs that led to the collapse of the League of Nations and the beginnings of World War II. It was also crippled from a lack of funding and support from member states and, as a result, never achieved its objective of creating a centralised system of international disaster relief.¹⁹

¹⁵ *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res 46/182, UN GAOR, 78th plen mtg, UN Doc A/Res/46/182 (19 December 1991) ('*Coordination of Humanitarian Emergency Assistance of the UN*').

¹⁶ Fisher, above n 11, 25–7.

¹⁷ *Convention and Statute Establishing an International Relief Union*, opened for signature 12 July 1927, 135 LNTS 247 (entered into force 27 December 1932) preamble.

¹⁸ Fisher, above n 11, 27.

¹⁹ David P Fidler, 'Disaster Relief and Governance after the Indian Ocean Tsunami: What Role for International Law?' (2005) 6 *Melbourne Journal of International Law* 458, 464.

Despite subsequent attempts, there has been little progress since in developing a centralised legal framework.²⁰ The IFRC has been the most prolific in its contribution to the law of international disaster relief, dating back to the organisation's establishment in 1919. In 2007, states party to the IFRC and the *Geneva Conventions*²¹ unanimously adopted *Guidelines for the Domestic Facilitation and Regulation on International Disaster Relief and Initial Recovery Assistance* ('*IDRL Guidelines*'), which suggest areas of legislative reform to improve the facilitation, coordination and effectiveness of disaster relief.²² Implementation of the *IDRL Guidelines* is recommended in two General Assembly resolutions²³ and in 2013 the IFRC, in collaboration with the UN Office of the Coordination of Humanitarian Affairs and the Inter-Parliamentary Union, launched model legislation of the *IDRL Guidelines* for domestic implementation ('*Model Act*').²⁴ The *Model Act* focuses outwardly on encouraging cooperation between states to reduce customs, transport and visa regulations in the facilitation and acceptance of international aid.

However, while the *IDRL Guidelines* aim to improve international disaster law through a bottom-up approach of domestic legislative change, there is a distinct lack of a top-down international legal structure that could complement the *IDRL Guidelines* by balancing state sovereignty with the right to receive humanitarian assistance. As noted in the 2000 World Disasters Report, all legal attempts at regulating disaster relief since the demise of the IRU have been

²⁰ In 1985 the United Nations Disaster Relief Coordinator developed the draft *Convention on Expediting the Delivery of Emergency Relief*, but it was never acted upon. The only multilateral treaty to deal with disaster relief is the *Tampere Convention* but it is limited in scope, has only 43 members and does not address the general facilitation of international disaster relief. See *Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations*, opened for signature 18 June 1998, 2296 UNTS 5 (entered into force 8 January 2005) ('*Tampere Convention*'). See also *Proposed Draft Convention on Expediting the Delivery of Emergency Relief — Report of the Secretary-General*, 39th sess, Agenda Item 83(a), UN Docs A/39/267/Add.2 and E/1984/96/Add.2 (18 June 1984).

²¹ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

²² See generally International Federation of Red Cross and Red Crescent Societies, 'Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery' (Report, 30 November 2007) <<https://perma.cc/TTY9-9MPF?type=source>>.

²³ *Strengthening of the Coordination of Emergency Humanitarian Assistance of the United Nations*, GA Res 63/139, UN GAOR, 63rd sess, 68th plen mtg, Agenda Item 65(a), UN Doc A/RES/63/139 (5 March 2009, adopted 11 December 2008) para 8; *International Cooperation on Humanitarian Assistance in the Field of Natural Disasters, from Relief to Development*, GA Res 63/141, 63rd sess, 68th plen mtg, Agenda Item 65(a), UN Doc A/RES/63/141 (10 March 2009, adopted 11 December 2008) para 5.

²⁴ International Federation of Red Cross and Red Crescent Societies, 'Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (with Commentary)' (Model Act, March 2013) <<http://perma.cc/CFB3-HWU4>> ('*Model Act*').

at the periphery of the issue. At the core is a yawning gap. There is no definitive, broadly accepted source of international law which spells out the legal standards, procedures, rights and duties pertaining to disaster response and assistance. No systematic attempt has been made to pull together the disparate threads of existing law, to formalize customary law or to expand and develop the law in new ways ... At the dawn of the 21st century, a cohesive approach to international disaster response law is not much farther along than it was at the start of the 20th.²⁵

The ILC sought to address this ‘yawning gap’. In 2007, the ILC officially commenced its project on the ‘Protection of Persons in the Event of Disasters’ and appointed Mr Eduardo Valencia-Ospina as Special Rapporteur to the UN. Pursuant to art 20 of the *Statute of the International Law Commission*,²⁶ the ILC is required to produce its work in the form of draft articles that are submitted to the General Assembly with commentary explaining the extent of international law in the area, current state practice and the response of states to the proposed articles.

Between 2008 and 2014, the Rapporteur submitted seven reports to the ILC to this effect, detailing a series of rights, duties and obligations on states within the context of international disaster law. According to the UN Secretariat:

[T]he objective of the proposal [was] the elaboration of a set of provisions which would serve as a legal framework for the conduct of international disaster relief activities; clarifying the core legal principles and concepts and thereby creating a legal ‘space’ in which such disaster relief work could take place on a secure footing.²⁷

As of 6 August 2014, the ILC has adopted on first reading all 21 draft articles and commentaries on the ‘Protection of Persons in the Event of Disasters’ proposed by the Drafting Committee. Of particular relevance to the scope of this paper, draft arts 13 and 14 propose a duty on the affected state to seek international assistance when its domestic capacity is overwhelmed and not to arbitrarily refuse such assistance if offered. They read as follows:

Article 13:

To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations, as appropriate.

Article 14:

1. The provision of external assistance requires the consent of the affected State.

²⁵ Peter Walker and Jonathan Walter (eds), ‘World Disasters Report 2000: Focus on Public Health’ (Report, International Federation of Red Cross and Red Crescent Societies, 2000) 145, 157.

²⁶ *Establishment of an International Law Commission*, GA Res 174 (II), UN GAOR, 6th Comm, 2nd sess, Agenda Item 33, UN Doc A/RES/174(II) (21 November 1947) annex (‘*Statute of the International Law Commission*’) art 20.

²⁷ International Law Commission, *Report of the International Law Commission on the Work of its Fifty-Eighth Session*, UN GAOR, 61st sess, Supp No 10, UN Doc A/61/10 (1 May–9 June and 3 July–11 August 2006) annex C (‘*Protection of Persons in the Event of Disasters*’) 475 [24].

2. Consent to external assistance shall not be withheld arbitrarily.
3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known.

Article 14 therefore provides for an obligation on a disaster-affected state not to arbitrarily refuse international disaster relief. The content of this duty, its practical application and the extent to which it could be legally binding on states is the substantive focus of this article.

B *Is There a Pre-Existing Legal Obligation Not to Arbitrarily Refuse International Disaster Relief?*

In formulating the legal/conceptual basis for an obligation not to arbitrarily refuse international disaster relief, the commentary to draft art 14 combines three other proposed duties within the ILC's work on the 'Protection of Persons in the Event of Disasters': (i) the duty of the affected state, by virtue of its sovereignty, to provide disaster relief to affected persons on its territory (draft art 12); (ii) the duty to cooperate internationally (draft art 8); and (iii) the duty to ensure the human rights of disaster victims on its territory (draft art 5). It is argued that these pre-existing norms of human rights and international law provide the requisite legal 'space' for the existence of an obligation not to arbitrarily refuse international disaster relief. The rationale is that when an affected state is unable or unwilling to respond, it is required to cooperate internationally to avoid violating right to life, food, clothing and shelter of its citizens.²⁸ Arbitrarily refusing international assistance in such circumstances would, according to the ILC, constitute a violation of these affiliated 'duties'.

Ultimately, while there is some basis in international law for the existence of a duty to cooperate and recognition that a state's sovereignty also entails obligations to its citizens, there is insufficient state practice or *opinio juris* to argue that the ILC Draft Articles, taken together, codify a customary obligation on states not to arbitrarily refuse international disaster relief. On the contrary, most state delegations in the Sixth Committee have argued that such an obligation is a progressive development, and not a codification, of international law.²⁹

1 *Draft Article 12: The Role of the Affected State*

The primary objection to accepting a legal obligation not to arbitrarily refuse international disaster relief is that it offends a state's sovereign right to refuse access to its territory.

Indeed, the principles of sovereign equality and non-intervention represent the foundations of international law. As noted by the UN General Assembly in

²⁸ Eduardo Valencia-Ospina, Special Rapporteur, *Fifth Report on the Protection of Persons in the Event of Disasters*, UN GAOR, 64th sess, UN Doc A/CN.4/652 (9 April 2012) ('*Eduardo Valencia-Ospina Fifth Report*').

²⁹ Giulio Bartolini, Tommaso Natoli and Alice Riccardi, 'Report of the Expert Meeting on the ILC's Draft Articles on the Protection of Persons in the Event of Disasters' (Report, Roma Tre University Department of Law and International Disaster Law Project, 8–9 June 2015) 54–6 ('*Report of the Expert Meeting*').

Resolution 2625, '[a]ll States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community'.³⁰ And again in *Resolution 46/182*, '[t]he sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the *Charter of the United Nations*'.³¹ Accordingly, draft art 14(1) acknowledges that the provision of external assistance is subject to the consent of the affected state.

However, there is equally a need to balance state sovereignty with the necessity of providing humanitarian assistance to victims of natural disasters. Several General Assembly resolutions have sought to address this tension. In *Resolution 43/131* of 1998 and *Resolution 45/100* of 1990, the General Assembly asserted that the 'abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity'.³² *Resolution 46/182* similarly stated that while it is the sovereign right of the affected state to accept or decline humanitarian assistance, states are 'called upon' to facilitate international assistance when their populations are in need, stating that access to victims is 'essential'.³³

To this end, the ILC formulated draft art 12, 'Role of the Affected State', which reads:

1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.
2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.

The Draft Articles were carefully drafted to refer to a state's 'duty' to its citizens as opposed to its 'responsibility'.³⁴ Rather than invoke connotations of the R2P doctrine by making a state's right to sovereignty conditional upon its responsible exercise of that sovereignty, which might be seen to justify forcible intervention in cases of breach, draft art 12 merely restates the principle that sovereignty imposes certain obligations — a principle that has a significant basis

³⁰ *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations*, GA Res 2625(XXV), UN GAOR, 6th Comm, 25th sess, 1883rd plen mtg, Agenda Item 85, UN Doc A/RES/2625(XXV) (24 October 1970) 124 ('*Friendly Relations Declaration*').

³¹ *Coordination of Humanitarian Emergency Assistance of the UN*, UN Doc A/Res/46/182, annex I ('*Guiding Principles*') art 3.

³² *Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations*, GA Res 43/131, UN GAOR, 3rd Comm, 43rd sess, 75th plen mtg, Agenda Item 105, UN Doc A/RES/43/131 (8 December 1998) preamble para 8; *Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations*, GA Res 45/100, UN GAOR, 3rd Comm, 45th sess, 68th plen mtg, Agenda Item 95, UN Doc A/RES/45/100 (14 December 1990) preamble para 5.

³³ *Guiding Principles*, UN Doc A/Res/46/182, annex I art 6.

³⁴ *Report of the Expert Meeting*, above n 29, 46.

in international law.³⁵ The advancement of universal human rights, the ability for individuals to seek legal reparation outside an offending state and the ability for states to be legally bound with or without their consent by such institutions as the UN, the International Criminal Court or the International Court of Justice ('ICJ') all point towards the conclusion that sovereignty necessarily entails certain obligations vis-à-vis the state and its citizens. According to the ILC, when a disaster-affected state is unable to fulfil such obligations, it is required to cooperate internationally.

2 Draft Article 8: The Duty to Cooperate

Article 1 of the *Charter of the United Nations* ('UN Charter') declares that its purpose, inter alia, is to 'achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights'.³⁶ Articles 55 and 56 strengthen this aspiration, requiring all member states to pledge themselves to cooperate for the promotion, universal respect for, and observance of, human rights and fundamental freedoms. To this end, the UN *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations*, established by the General Assembly as an 'authoritative interpretation' of the *UN Charter*, has declared that:

States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.³⁷

The ILC draft articles on the 'Responsibility of States for Internationally Wrongful Acts' declare that states are obliged to cooperate to end violations of *jus cogens* norms,³⁸ while numerous multilateral treaties, including those that pertain to international disaster relief, list international cooperation as obligatory means to realise the treaty's objective where domestic measures are inadequate.³⁹

Some commentators have argued that, specific to disaster relief, a duty to cooperate has traditionally been limited to reducing administrative and

³⁵ See, eg, *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 43 (Judge Alvarez) ('*Corfu Channel*'); *SS Wimbledon (Britain v Germany) (Judgment)* [1923] PCIJ (ser A) No 1 ('*SS Wimbledon*'). The International Law Commission ('ILC') commentary to draft art 12 also places reliance on the opinion expressed by Max Huber, Arbitrator, in the *Island of Palmas* case: 'Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States'. *Island of Palmas (The Netherlands v United States of America) (Awards)* (1928) 2 RIAA 831, 839.

³⁶ *Charter of the United Nations* art 1(3).

³⁷ *Friendly Relations Declaration*, UN Doc A/RES/2625(XXV).

³⁸ *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 85th plen mtg, Agenda Item 162, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex ('*Responsibility of States for Internationally Wrongful Acts*') arts 40–1.

³⁹ *Report of the ILC Sixty-Sixth Session*, UN Doc A/69/10, 104–7.

bureaucratic barriers on customs and tariffs.⁴⁰ However, it is submitted that, in agreement with the ILC commentary, the duty to cooperate requires the affected state to look beyond its borders when a disaster has overwhelmed its domestic capacity. The majority of state delegations in the Sixth Committee agreed that this duty had reached customary status.⁴¹ Notwithstanding, it should be noted that the duty to *seek* assistance is distinct from the obligation not to arbitrarily refuse assistance, as the former proposes no qualification or consequence on the affected state's ability to decline all offers of disaster relief, irrespective of need. To support a legal obligation not to arbitrarily refuse international assistance, the ILC relies on the operation of international human rights law.

3 *Draft Article 5: The Obligation to Ensure the Human Rights of Disaster Victims*

The final step in the ILC's framework is the obligation on the affected state to protect the human rights of its citizens. Put simply, where the affected state's domestic capacity is exceeded and the duty to cooperate has led to offers of international assistance, it is not permitted to arbitrarily refuse where such refusal would violate the human rights of disaster victims on its territory.

However, before assessing the validity of this conception, it is worth considering whether there is a general right to humanitarian assistance in international law. The IFRC has stated that, '[t]he right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries'.⁴² Some commentators have echoed this sentiment in calling for the establishment, or the existence, of a legally enforceable right to humanitarian assistance.⁴³ If such a right were legally enforceable, a disaster-affected state that is unable or unwilling to meet the needs of its people would not be permitted to arbitrarily refuse international assistance without violating this right and consequently committing an internationally wrongful act. This would be the case irrespective of an obligation to cooperate.

However, a right to humanitarian assistance has not been recognised in the context of natural disasters. This can be contrasted, by analogy, to situations of a non-international armed conflict, in which there is a similar need to balance state sovereignty with humanitarian assistance. According to art 18(2) of the *Second Protocol Additional to the Geneva Conventions of 1949* ('APII'), the provision

⁴⁰ Craig Allan and Thérèse O'Donnell, 'A Call to Alms?: Natural Disasters, R2P, Duties of Cooperation and Uncharted Consequences' (2012) 17 *Journal of Conflict & Security Law* 337, 351.

⁴¹ *Report of the ILC Sixty-Sixth Session*, UN Doc A/69/10, 120. However, it is worth noting that the *Report of the Expert Meeting* indicates that the debate surrounding the customary status of the duty to seek assistance was fairly divided. See generally *Report of the Expert Meeting*, above n 29.

⁴² International Federation of Red Cross and Red Crescent Societies, 'Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief' (Code of Conduct) 3 [1] <<https://perma.cc/8C3X-M7Y4>>.

⁴³ Chan Leng Sun, 'Humanitarian Assistance by International Organisations: A Question of Compulsory Access to Victims' [1991] *Singapore Journal of Legal Studies* 320, 321, 347; Rebecca Barber, 'Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law' (2009) 91 *International Review of the Red Cross* 371, 371.

of humanitarian assistance is ‘subject to the consent’ of the parties.⁴⁴ However, the International Committee of the Red Cross (‘ICRC’) commentary to that provision, which has since obtained customary status in international law,⁴⁵ holds that ‘[t]he authorities responsible for safeguarding the population in the whole of the territory of the State cannot refuse such relief without good grounds’,⁴⁶ declaring that such refusal would be in violation of art 14 of *APII* (protection of objects indispensable to the survival of the civilian population).⁴⁷

While this provides a useful analogy through which it can be seen that states are prepared to limit aspects of their sovereignty in favour of ensuring humanitarian assistance to those in need, this qualification of a state’s right to refuse offers of humanitarian assistance falls under the *sui generis* of international humanitarian law and is therefore inapplicable in the context of a natural disaster, wherein the sovereignty of the affected state remains completely undisturbed.⁴⁸

The commentary to the ILC Draft Articles also makes reference to principle 25(2) of the *Guiding Principles on Internal Displacement* (‘*Internal Displacement Principles*’), which holds that ‘[c]onsent [to offers of humanitarian assistance] shall not be arbitrarily withheld, particularly when the authorities concerned are unable or unwilling to provide the required humanitarian assistance’.⁴⁹ However, despite gaining considerable traction through UN Security Council resolutions and burgeoning state practice, the *Internal Displacement Principles* cannot be said to have created a customary right to receive humanitarian assistance in the context of a natural disaster.

The Rapporteur’s interpretation of the duty to cooperate in international law, if accepted, must therefore pertain to human rights with universal application if it is to justify an obligation on states not to arbitrarily refuse post-disaster humanitarian assistance. The most obvious choice is the right to life. Others include the right to food, shelter and clothing to victims of natural disasters, all of which are mentioned in the commentary to the ILC Draft Articles.

The Human Rights Committee has stated that the right to life in art 6 of the *International Covenant of Civil and Political Rights* (‘*ICCPR*’)⁵⁰ must be interpreted so as to impose positive obligations on the state to protect the lives of

⁴⁴ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) art 18(2) (‘*APII*’).

⁴⁵ Jean-Marie Henckaerts and Louise Doswald Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol 1, 196–7.

⁴⁶ International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977: *Commentary — Relief Societies and Relief Actions* <<https://perma.cc/C2WT-BC8L>>.

⁴⁷ *APII* art 14.

⁴⁸ Heath, above n 6, 426.

⁴⁹ *Guiding Principles on Internal Displacement*, UN ESCOR, 54th sess, Agenda Item 9(d), UN Doc E/CN.4/1998/53/Add.2 (11 February 1998) principle 25(2).

⁵⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘*ICCPR*’).

its citizens.⁵¹ With respect to the correlative rights to food, clothing and shelter, art 2(1) of the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR') states that:

Each State Party to the present *Covenant* undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present *Covenant* by all appropriate means, including particularly the adoption of legislative measures.⁵²

That the *ICCPR* and *ICESCR* impose positive obligations on states is relatively uncontroversial. Both treaties require states to 'respect', 'ensure' and 'secure' the rights contained therein through international cooperation. A basic exercise in statutory interpretation demonstrates that while the obligation to *respect* human rights can be fulfilled through inaction, that is, where the state does not infringe on an individual's rights, the obligation to *ensure* or *secure* such rights requires the state to adopt positive measures,⁵³ a principle that has been confirmed by the European Court of Human Rights.⁵⁴ It is equally accepted that the rights contained within these instruments that are of particular relevance to international disaster relief, namely, the right to life, shelter and food, have obtained customary status in international law.⁵⁵

What is contentious is whether the positive obligation to ensure these rights necessarily entails an obligation not to arbitrarily refuse international disaster relief. According to the ILC commentary, arbitrary refusals of humanitarian assistance from a disaster stricken state would violate the undertaking to cooperate internationally for the realisation of the *ICESCR* and, in doing so, violate the specific rights to food, shelter and clothing. Similarly, arbitrarily refusing post-disaster assistance would, under certain circumstances, violate the right to life in art 6 of the *ICCPR*.⁵⁶ This interpretation is conceptually sound and is supported by numerous commentators on the subject.⁵⁷ It draws strongly on the aforementioned duty to cooperate internationally to achieve the full realisation of human rights as required by relevant treaties and the *UN Charter*.

However, it is not irreproachable. Most notable is the fact that any attempt to form a connection between positive fulfilment of the right to life and an obligation not to arbitrarily refuse humanitarian assistance has been predominantly academic. There is almost no relevant state practice and the ILC

⁵¹ Human Rights Committee, *Compilation of General Comments and General Recommendations Adopted by Human Right Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (8 May 2006) 167 [5].

⁵² *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 2(1).

⁵³ Eduardo Valencia-Ospina, Special Rapporteur, *Sixth Report on the Protection of Persons in the Event of Disasters*, UN GAOR, 65th sess, UN Doc A/CN.4/662 (3 May 2013) 15.

⁵⁴ See *Öneryildiz v Turkey (Just Satisfaction)* [2004] XII Eur Court HR 79, 130 [134]; *Budayeva v Russia (Just Satisfaction)* [2008] II Eur Court HR 267, 288–9 [128]–[129].

⁵⁵ Allan and O'Donnell, 'A Call to Alms?', above n 40, 353.

⁵⁶ *ICCPR* art 6.

⁵⁷ See Katja Luopajarvi, 'Is There an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons under International Law?' (2003) 15 *International Journal of Refugee Law* 678, 691–4; Sun, above n 43, 325–8; Barber, above n 43, 392.

has therefore relied on the *Internal Displacement Principles* which, although highly respected, are ultimately non-binding and an arguably tenuous basis on which to assert corresponding obligations on states in the context of disaster relief. Of course, this is not detrimental to the persuasiveness of the ILC's conceptual framework for an obligation not to arbitrarily refuse international disaster relief, but it does mean that the obligation is a progressive development and not a codification of international law. Furthermore, despite the fact that there is nothing preventing states from entering into legally binding bilateral treaties or regional agreements, it is unlikely they will do so of their own volition in the absence of an international forum and architecture to discuss the nuanced issues of sovereignty and human rights in the offering and acceptance of international disaster relief.⁵⁸ Accordingly, the best way to ensure that ILC Draft Articles have legally binding force is to have them codified in a multilateral treaty.

III SHOULD THE ILC DRAFT ARTICLES BE REFLECTED IN A MULTILATERAL TREATY?

A *Soft versus Hard Obligations*

Pursuant to art 23(1) of the *Statute of the International Law Commission*, the ILC could either recommend that the General Assembly adopt the Draft Articles by resolution, which would turn them into an instrument of soft law, or convoke a conference to conclude a convention, which would lead to the development of a multilateral treaty. While there are advantages and detractions in both approaches, it is submitted that the latter would prove the most effective.

As noted by Arnold Pronto, Senior Legal Advisor to the Secretariat of the ILC, it is easy to understand why some view non-binding guidelines as the preferable outcome of the ILC's work on disasters.⁵⁹ Soft law obligations are more likely to attract widespread support and will be more flexible to amendment — a potentially useful attribute in a field that is as dynamic and changeable as the law of international disaster relief. Furthermore, non-binding documents are more likely to avoid the 'well-known' difficulties that can arise in convening a treaty, namely, the time and cost; the risk of politicisation and dilution of the Draft Articles' original intentions; the potentially 'decodifying' influence of an unsuccessful treaty; and the retrograde effect that state

⁵⁸ For example, regional arrangements such as the *ASEAN Agreement on Disaster Management and Emergency Response* propose no qualification on the right to refuse, stating in art 3(1) that: '[E]xternal assistance or offers of assistance shall only be provided upon the request or with the consent of the affected Party': *ASEAN Agreement on Disaster Management and Emergency Response*, ASEAN Documents Series 2005, opened for signature 26 July 2005 (entered into force 24 December 2009) art 3(1). Further, the comments made by state delegations in the Sixth Committee that the obligation not to arbitrarily refuse is a progressive development of international law indicate that states would be unlikely to sign up without considerable diplomatic pressure in an international setting.

⁵⁹ Arnold Pronto, 'Consideration of the Protection of Persons in the Event of Disasters by the International Law Commission' (2009) 15 *ILSA Journal of International & Comparative Law* 449, 455.

reservations can have on otherwise largely accepted norms of international human rights law.⁶⁰

The experience of the *Internal Displacement Principles* also demonstrates that soft law instruments can attain a considerable degree of authority through widespread state agreement and burgeoning state practice.⁶¹ Indeed, the ICJ held in *Nicaragua v United States of America* ('*Nicaragua*') that evidence of *opinio juris* can be gleaned from non-binding instruments such as General Assembly resolutions and other declarations of international law, stating that '[t]he effect of consent to the text of such resolutions ... may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution'.⁶² With regards to state practice, the ICJ held that:

In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.⁶³

From this it is reasonable to conclude that, even if the ILC's Draft Articles take the form of a non-binding instrument, some of the more progressive developments of international law contained therein still have the potential to achieve customary status if they are widely accepted in the General Assembly and subsequently reflected in consistent state practice.

However, turning the ILC's work on disasters into an instrument of soft law would be counterproductive and unlikely to achieve the success of the *Internal Displacement Principles*. Firstly, there is already an abundance of guidelines, aspirations and principles within the field of international disaster law.⁶⁴ The ILC would run the risk of unnecessary duplication and potentially detract from the legitimacy and impact of existing documents, most notably the IFRC's *IDRL Guidelines*. This potential conflict led the IFRC to officially declare its preference for the development of a multilateral treaty, stating that:

We don't think that the option of presenting them as guidelines would be advisable. Such guidelines might be seen to compete with, and hamper the progress in, the implementation of existing guidelines on very similar themes, in particular the *IDRL Guidelines*, as previously negotiated and adopted by the state parties to the *Geneva Conventions*.

⁶⁰ Dug Cubie, 'An Enchanted Tool? Humanitarian Assistance and the ILC Draft Articles on the Protection of Persons in the Event of Disasters' in Fiona de Londras and Siobhán Mullally (eds), *The Irish Yearbook of International Law* (Hart, 2009–10) vols 4–5, 119, 145.

⁶¹ *Ibid* 139–41.

⁶² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 100 [188] ('*Nicaragua*').

⁶³ *Ibid* 98 [186].

⁶⁴ Cubie, 'An Enchanted Tool?', above n 60, 142–3.

On the other hand, we think that strengthening the global legal framework would add a new element with the potential to further stimulate and enhance the work that has been accomplished through soft instruments.⁶⁵

Furthermore, it was noted in the debate surrounding the final form of the draft articles on the 'Responsibility of States for Internationally Wrongful Acts' that the General Assembly is liable to substantially amend those articles or attach interpretive declarations to the final instrument, leading one commentator to note that 'a General Assembly declaration entailed the same problems as a convention, but without the advantages'.⁶⁶ Adopting the Draft Articles by resolution would therefore be of little practical value amid the plethora of equivalent soft law instruments, and could also be deprived of its normative content through state amendments.

Another concern is the labelling of a soft law instrument as 'non-binding' when certain obligations contained within it are in fact legally binding, either through custom, a corresponding treaty to which the state is party or indeed through the domestic law of the relevant state.⁶⁷ This could pose specific problems with regards to the human rights to life, food, shelter and freedom from discrimination contained within the Draft Articles if it were to be adopted as non-binding guidelines. As noted by Pronto, such provisions are not recommendatory but binding by way of treaty or custom and their inclusion in non-binding texts 'may actually contribute to the watering-down of their legal force'.⁶⁸

It is therefore submitted that the ILC Draft Articles should be formalised in a multilateral treaty. However, as stated by ILC member Georg Nolte, '[a] convention would only make sense if those States that typically hesitated to allow a free flow of disaster would be likely to ratify it'.⁶⁹ It is therefore necessary to isolate the factors that contribute to arbitrary refusals of international disaster relief and examine how those factors might be overcome in a multilateral treaty.

IV OVERCOMING THE POLITICISATION OF INTERNATIONAL DISASTER RELIEF

A *Why Do States Arbitrarily Refuse International Disaster Relief?*

Contrary to the popular conception that disaster refusal is more prevalent in a particular type of state, the quantitative study conducted by Travis Nelson concluded that autocratic regimes were no more or less likely to refuse international disaster assistance than democratically elected states.⁷⁰ Rather, it is

⁶⁵ Anne Christensen 'Statement by Ms Anne Christensen on Behalf of the International Federation of Red Cross and Red Crescent Societies' (Speech delivered for the Report of the International Law Commission on the Work of Its Sixty-Sixth Session, New York, 29 October 2014) <<http://perma.cc/EGX9-ZYMA>>.

⁶⁶ Cubie, 'An Enchanted Tool?', above n 60, 146.

⁶⁷ Pronto, above n 59, 455–6.

⁶⁸ Ibid 456.

⁶⁹ International Law Commission, *Provisional Summary Record of the 2980th Meeting*, 60th sess, 2nd pt, UN Doc A/CN.4/SR.2980 (5 August 2008) 8.

⁷⁰ Travis Nelson, 'Rejecting the Gift Horse: International Politics of Disaster Aid Refusal' (2010) 10 *Conflict, Security & Development* 379, 395.

the timing of the government's ascendency to power and the relative degree of control and public support that is determinative. The study found that recently transitioned or transitioning states were more likely to 'publicly and explicitly refuse aid and insist on their own ability to handle disaster relief and recovery'.⁷¹ This led to the inevitable conclusion that 'aid refusal, much like aid provision, is at its core a political act'.⁷²

Refusals of international disaster relief are largely motivated by the fear that politicised aid will infringe upon the affected state's political autonomy. Broadly speaking, this might be referred to as the rejecting of aid on the basis of sovereignty, whether to protect territorial integrity from a perceived threat of intervention, or to protect the sovereign right of self-governance from unwelcome political interference. Objections to the ILC's proposed obligation not to arbitrarily refuse international disaster relief have also followed a similar logic.⁷³

Myanmar's refusal of international disaster relief in May 2008 showcases the politics of refusing aid for the protection of national sovereignty. The country's long history of succumbing to foreign invasion, its 'precarious' policy of non-alignment during the Cold War, its subsequent transition from communism to authoritarianism and its isolation from the international community due to the political and economic sanctions of the United States and Europe (in particular) have all contributed to Myanmar's deep mistrust of foreign cooperation — a political atmosphere that is particularly conducive to arbitrary refusals of international disaster relief.⁷⁴

Amid the turmoil and international condemnation of Myanmar's rejection of international aid, the then French Foreign Minister Bernard Kouchner proposed to the UN Security Council that it invoke the R2P doctrine to forcibly impose relief on the cyclone-ravaged state.⁷⁵ Just a few days prior, President George W Bush reaffirmed the US' commitment to help the Myanmar people 'in their struggle to free themselves from the regime's tyranny'⁷⁶ while simultaneously renewing US sanctions against the state — a policy that has been argued by some to have exacerbated the poverty of the Myanmar people and the isolationism of its military regime.

Even after the UN Security Council had expressly rejected the applicability of the R2P doctrine (both China and Russia immediately vetoed the proposal and Indonesia, a non-permanent member, abstained), several commentators note that Myanmar's military regime remained wary of unilateral humanitarian intervention by the US and its allies of the type experienced by Panama in 1989, Haiti in 1994 and Iraq in 2003, especially as the US had consistently expressed

⁷¹ Ibid 379.

⁷² Ibid.

⁷³ Craig Allan and Thérèse O'Donnell, 'An Offer You Cannot Refuse? Natural Disasters, the Politics of Aid Refusal and Potential Legal Implications' (2013) 5(1) *Amsterdam Law Forum* 36.

⁷⁴ Catherine Shanahan Renshaw, 'Disasters, Despots, and Gun-Boat Diplomacy' in David D Caron, Michael J Kelly and Anastasia Telesetsky (eds), *The International Law of Disaster Relief* (Cambridge University Press, 2014) 164, 180.

⁷⁵ Ford, above n 9, 233.

⁷⁶ Office of the Press Secretary, 'Statement by the President on Burma' (Press Release, 1 May 2008) <<https://perma.cc/6XYU-6SDG?type=source>>.

its desire for political regime change.⁷⁷ Historically, Myanmar was made aware that its geopolitical position during the Cold War was perceived by the Truman administration as a gateway in China's plan to turn the Southeast Asian bloc into a communist empire. In the intervening period, US warships had twice been spotted off the Myanmarese coast of Bengal,⁷⁸ first in 1988 during the pro-democracy protests to end the 26-year dictatorship of General Ne Win, and again in 1991 when over 200 000 Rohingya refugees fled into Bangladesh to escape persecution.⁷⁹

It is therefore unsurprising that when the Myanmar regime saw naval and warships from Britain, France and the US approaching its territory, it invoked its national sovereignty to refuse entry,⁸⁰ claiming that, '[t]he strings attached to the relief supplies carried by warships and military helicopters are not acceptable to the Myanmar people'.⁸¹ While there is no evidence that the US ever had any intention to invade and, from a current geopolitical perspective there would be almost no practical benefit in doing so,⁸² it is important to understand that Myanmar's refusal was more complex than the Western rhetoric that the regime simply did not care for the welfare of its citizens.⁸³ Against the backdrop of international sanctions and active political opposition, the regime developed genuine fears that an influx of foreign relief workers would provide the catalyst for military intervention.⁸⁴ As stated by Catherine Renshaw, 'the American "threat" — illusory as though it may have been — was a reality to Myanmar's leaders'.⁸⁵

Overt politicisation in the provision of aid, whether genuine or perceived, thus constitutes a primary reason for affected states to refuse international disaster relief. An equal, if not greater, reason behind such refusal is the domestic power politics at play within the affected state. This is captured by Nelson's 'regime transition' hypothesis in which he concludes that recently transitioned or transitioning states are more likely to take a public and symbolic stand on international aid, due to their susceptibility to high energy mass politics and their need to establish or maintain domestic legitimacy.⁸⁶

As noted by Renshaw, the portrayal of pre-Nargis Myanmar as a two-dimensional struggle between democracy and authoritarianism belies the ethnic tensions and disunity within the country.⁸⁷ In particular, the ruling regime

⁷⁷ Renshaw, above n 74, 169.

⁷⁸ Selth, above n 5, 380–3.

⁷⁹ Ibid 384.

⁸⁰ Ibid 388; Renshaw, above n 74, 169. Both Andrew Selth and Catherine Renshaw note that Myanmar continuously denied naval vessels from Britain, France and the United States carrying aid supplies to make landing. Renshaw reports that *USS Essex* and its support ships left Myanmar on 7 June 2008 after 15 unsuccessful attempts to gain permission, while the British *HMS Edinburgh* and French *Le Mistral* abandoned their missions in late May, the latter of which offloaded its supplies in Thailand.

⁸¹ Selth, above n 5, 392, quoting Eric Talmadge, 'Myanmar Appears to Nix US Navy Help, Saying "Strings Attached"', *Associated Press* (Bangkok), 22 May 2008.

⁸² Selth, above n 5, 395.

⁸³ Renshaw, above n 74, 188.

⁸⁴ Selth, above n 5, 391–9

⁸⁵ Renshaw, above n 74, 170.

⁸⁶ Nelson, above n 70, 380.

⁸⁷ Renshaw, above n 74, 167.

had endured a 60-year-long unresolved conflict with the political wing of the ethnically Karen state, the Karen National Union, which had on occasion sought military support from the US.⁸⁸ Fearing that the disaster could galvanise support for such dissident groups in a manner similar to the East Pakistan floods of 1970, wherein the Pakistani government's inadequate response contributed to the secession of Bangladesh, the regime made every effort to enforce its position of power and assert its political legitimacy.⁸⁹

In addition to prioritising the military regime's own concentration of power over the immediate needs of disaster victims by pushing ahead with the proposed referendum for a new constitution, the regime used extensive propaganda in an attempt to legitimise their leadership and oppose international relief efforts. On 11 May 2008, nine days after the cyclone made landfall, the regime's official newspaper *The New Light of Myanmar* published a cartoon

depicting a group of smiling voters running toward the ballot box having the following conversation: 'When we are confronted with natural disasters we all cooperate! When internal and external saboteurs attack us we defend ourselves together! It is because the army and the people are on the march hands joined!'⁹⁰

In a more direct fashion, a road sign entitled 'The People's Desire' was erected by the regime, which read:

Oppose those relying on external elements, acting as stooges, holding negative views. Oppose those trying to jeopardize stability of the state and Progress of the nation. Oppose foreign nations interfering in internal affairs of the state. Crush all internal and external destructive elements as the common enemy.⁹¹

Myanmar's fear of intervention and domestic political backlash reflect the statistical conclusion that sovereignty objections and the regime transition hypothesis cover the most common reasons for refusing international disaster relief and both point to the same conclusion: offering and accepting international disaster relief is a political act. Given the military's preoccupation with passing the new constitution to solidify its power, Nelson argues that Myanmar was effectively a regime in transition and therefore fell within his theoretical model.⁹² This conclusion is supported by the fact that the regime was particularly concerned with bolstering its public image and demonstrating its political legitimacy and was therefore, to use the words of Nelson, susceptible to high energy mass politics and more likely to take a public and symbolic stand against international humanitarian assistance.⁹³ It is interesting to note, however, that the regime's refusal of international disaster relief had the opposite effect. Rather than prove its capacity to govern, its actions demonstrated the true extent of its incompetence and authoritarianism, thereby paving the way for subsequent democratic change.⁹⁴

⁸⁸ *Burma: A KNU Perspective on Ethnicity, Peace Talks* (September 25 2009) Wikileaks <<http://perma.cc/PCH8-LHAV>>.

⁸⁹ Renshaw, above n 74, 168.

⁹⁰ *Ibid* 169.

⁹¹ Willis, above n 3, 139.

⁹² Nelson, above n 70, 398.

⁹³ *Ibid*.

⁹⁴ Willis, above n 3, 137–8.

It is therefore evident not only that arbitrary disaster relief refusal is a politically motivated act, but also that it has adverse consequences for the government of the offending state by actually reducing its political reputation, both domestically and internationally. Rather than ignore this reality, a multilateral treaty that obliges states not to arbitrarily refuse international disaster relief must be framed in a way that protects the affected state's right to self-governance and control of the relief effort so that states will be encouraged to accept necessary humanitarian assistance as a means of establishing or demonstrating their domestic political legitimacy to govern.

B *Overcoming the Politicisation of International Disaster Relief*

If there is one principle that dominates the commentary to the ILC Draft Articles, it is the sovereign equality of nations. The role of the affected state, by virtue of its sovereignty, is the starting point from which all other duties and obligations flow. It is responsible for the provision of aid to disaster victims on its territory, for cooperating internationally when needed and for facilitating international disaster assistance where necessary and appropriate. In short, the protection of persons in the event of disasters, however achieved, is the sovereign obligation of the affected state.

As noted by the Permanent Court of International Justice in the *SS Wimbledon Case*,⁹⁵ the ability of states to undertake binding legal obligations is not an abandonment but an *attribute* of state sovereignty.⁹⁶ This concept has only become more prevalent over time with the post-1945 UN conception of 'sovereign equality', which continuously reaffirms the sovereignty of nations as the 'collective expression of sovereign wills' in determining international standards and laws.⁹⁷ As stated by the ICJ in the *Corfu Channel Case*:

By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States.

Sovereignty confers rights upon States and imposes obligations on them.⁹⁸

An obligation not to arbitrarily refuse international disaster relief, therefore, is not in and of itself inconsistent with the principle of sovereignty.

Critics focus on the politicisation of both offers and refusals of international disaster relief to question why states would voluntarily place themselves under an obligation to accept assistance that might weaken their political position, both domestically and internationally, and open themselves up to punishment if they refuse. Craig Allan and Thérèse O'Donnell argue that 'forcing aid as a matter of compulsion is unhelpful' and that the 'ILC's approach actually truncates proper analysis' as it 'fails to fully recognise the politics of aid donation and refusal, and

⁹⁵ *SS Wimbledon* [1923] PCIJ (ser A) No 1.

⁹⁶ *Ibid* 25.

⁹⁷ Oscar Schachter, 'The Decline of the Nation-State and Its Implications for International Law' (1998) 36 *Columbia Journal of Transnational Law* 7, 7.

⁹⁸ *Corfu Channel* [1949] ICJ Rep 4, 43 (Judge Alvarez).

maintains a relationship with R2P via the language of arbitrariness and failure, appearing as R2P-light'.⁹⁹

This approach assumes that the purpose of an obligation not to arbitrarily refuse international disaster relief is to compel states to accept unwanted assistance or to punish them for refusing. However, when the ILC Draft Articles are viewed in their entirety and as the preparatory stages of a multilateral treaty based on the sovereign equality of nations, their purpose is clearly not to infringe the sovereignty of the affected state, but to encourage better state practice through positive reinforcement of a state's sovereign obligations. Emphasis should be placed on why becoming a signatory to a treaty that regulates the offering, acceptance, facilitation and termination of international disaster relief would not only progress the human rights of disaster victims worldwide, but also further the national interest of the affected state itself.

Consider a disaster-affected state that, through a legally enforceable treaty, has the following assurances: (i) its assessment that the disaster is within its domestic capacity must be *prima facie* accepted by the international community; (ii) it is legally defined as the central controlling authority for the facilitation of all international assistance it chooses to accept; (iii) the provision of international disaster relief, once consented to, is confined to objectively observable principles of humanity, neutrality, impartiality and non-discrimination; and (iv) acceptance of one source of international disaster relief is not an implicit acceptance of others, thereby retaining the sovereign right of the affected state to choose the most appropriate offer of assistance and to avoid unwanted interference. Such regulations are not designed to compel an affected state to accept disaster relief against its will, but rather to provide the legal framework and assurances necessary for it to accept such assistance with the confidence that its sovereignty will be respected.

The same principles apply to overcoming the domestic politics of aid refusal, that is, the fear that aid acceptance will damage perceptions of legitimacy and competency. Nelson notes that 'passive disaster aid acceptance, as opposed to active disaster response, sends a signal of weakness, and a weak regime is a regime that has lost a portion of its basic domestic authority'.¹⁰⁰ However, accepting aid through treaty mechanisms is unlikely to be perceived as 'passive'. Where an affected state immediately enacts a treaty measure to respond to offers of international disaster relief, and is subsequently seen to have assumed its sovereign role as the primary coordinator and director of such assistance, it sends a clear message of competence and legitimacy.

Such was the case in the aftermath of Cyclone Nargis, when then Prime Minister (now Incumbent President) and Chair of the National Disaster Committee Thein Sein emerged as a respected leader, both within the military and among the people, for his engagement with the international community in responding to the disaster.¹⁰¹ By contrast, military generals who had attempted to frustrate the international relief effort and refuse external assistance, such as General Maung Aye, emerged as 'recalcitrant and backward looking'.¹⁰² This

⁹⁹ Allan and O'Donnell, 'An Offer You Cannot Refuse', above n 73, 62.

¹⁰⁰ Nelson, above n 70, 387.

¹⁰¹ Renshaw, above n 74, 186.

¹⁰² *Ibid* 184.

highlights the point that acceptance of international disaster assistance can be both an expression of sovereignty *and* a demonstration of the affected state's legitimacy, or at least competency, to govern. A multilateral treaty must therefore include specific provisions that protect and *enhance* the affected state's right to self-governance and control in the facilitation of international disaster relief.

V A MULTILATERAL TREATY ON THE PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

In light of the preceding discussion, a multilateral treaty that includes the obligation not to arbitrarily refuse international disaster relief should contain the following provisions:

1. There must be clear delineations and guidelines for determining what constitutes an 'arbitrary' refusal of international disaster relief;
2. The burden should be on the assisting state or organisation to prove that the affected state's refusal is arbitrary;
3. The affected state should have the right to unilateral termination of the relief; and
4. The consequences of arbitrarily refusing international disaster relief should be limited to the commission of an internationally wrongful act so that under no circumstances is the territorial integrity of the affected state under threat.

A *What Constitutes an 'Arbitrary' Refusal of International Disaster Relief?*

ILC draft art 11 provides that international disaster relief is subject to the consent of the affected state and that consent to such relief shall not be withheld arbitrarily. The commentary to draft art 11 declares that a refusal will *not* be arbitrary when: (1) the affected state is itself willing and able to respond; (2) it has received sufficient assistance elsewhere; or (3) the offer is not extended in accordance with the principles of humanity, neutrality, impartiality and non-discrimination (reflected in ILC draft art 7).¹⁰³ It is necessary to consider each criterion to determine whether 'arbitrariness' in withholding consent to international disaster relief is capable of independent adjudication.

1 *When the Affected State Is Itself Willing and Able to Respond*

Earlier versions of draft art 11 read that '[c]onsent to external assistance shall not be withheld arbitrarily if the affected state is *unable or unwilling* to provide the assistance required'.¹⁰⁴ The Special Rapporteur does not explain the omission of the phrase 'unable or unwilling' in subsequent commentaries or reports to the Sixth Committee, but it is likely attributable to the concern expressed by some states that no attempt had been made to offer objective criteria for determining *how* a state may be deemed 'unable or unwilling'. Clearly, omitting the phrase from the text does not preclude the necessity of developing an objective test.

¹⁰³ Eduardo Valencia-Ospina, Special Rapporteur, *Fourth Report on the Protection of Persons in the Event of Disasters*, UN GAOR, 63rd sess, UN Doc A/CN.4/643 (11 May 2011).

¹⁰⁴ *Ibid* 24 [77] (emphasis added).

First and foremost, the affected state's assessment of its capacity and willingness to respond should be prima facie accepted so that the burden lies with the assisting actor to prove otherwise. This is ostensibly the position of the ILC, which stated in the commentary to draft art 13 (the duty to seek assistance) that 'the [g]overnment of a[n affected] State will be in the best position to determine the severity of a disaster situation and the limits of its national response capacity'.¹⁰⁵ The IFRC has also espoused a similar stance.¹⁰⁶

However, what happens when there is evidence or allegations contrary to the affected state's assertion that it is able and willing to respond to a disaster? What if the affected state is *known* to have insufficient resources or has a *demonstrated* unwillingness to care for the needs of a particular group within its society? It is submitted that the sovereign ability of the affected state to determine whether a disaster has exceeded its domestic capacity should be subject to two qualifications: first, where evidence of inability or unwillingness becomes apparent through the mass or ongoing suffering of disaster victims; and secondly, where inability or unwillingness is manifest prior to, or immediately following, the disaster.

The first qualification is often referred to as the 'hardship' or 'needs-based' approach and is the most reliable in determining the extent to which a state is able and willing to respond to the needs of (disaster) victims on its territory.¹⁰⁷ It is a factual assessment in which the continued suffering of victims indicates that the affected state is either incapable of responding effectively or unwilling to do so. Furthermore, it corresponds to the practicality of accepting the affected state's assessment of its own capacity until there is strong evidence to the contrary. The obvious weakness is that large-scale human suffering must often occur before a state's incapacity or unwillingness is brought to light.¹⁰⁸

It has been argued elsewhere that another flaw of the hardship approach is that even where an affected state has the capacity to respond and is attempting to do so in good faith, unavoidable human suffering due to the magnitude of the disaster might nonetheless trigger the obligation not to refuse assistance.¹⁰⁹ This, it is argued, would constitute an unacceptable sovereign infringement on an affected state that deems itself both willing and able to respond to the disaster.¹¹⁰

However, if an affected state perceived a disaster to be within its domestic capabilities but subsequently found that it could not prevent widespread suffering of the population, it is incumbent upon that state not to arbitrarily refuse genuine offers of international assistance. While it is true that the initial refusal may not have been arbitrary but rather a mistake of fact, subsequent refusal cannot be justified on the basis that the affected state is 'able and willing' once it has discovered that the disaster overwhelms its domestic capacity.

The hardship approach is thus a reliable means of assessing whether a state is able or willing to respond to the needs of disaster victims on its territory. It respects the affected state's sovereign right to determine whether a disaster is

¹⁰⁵ Ibid 15–16 [49].

¹⁰⁶ See generally Fisher, above n 11.

¹⁰⁷ Heath, above n 6, 459–60.

¹⁰⁸ Ibid 461–2.

¹⁰⁹ Ibid.

¹¹⁰ Ibid 461.

within its domestic response capacity, but provides a necessary caveat on the extent to which such an assessment can be used to justify refusals of international disaster relief.

The second qualification on the affected state's right to determine its own response capacity is where there is a *manifest* inability or unwillingness to respond prior to, or immediately after, a disaster. The benefit of this approach is that the international community can make an assessment as to the incapacity or unwillingness of a state without waiting for the death toll to increase.¹¹¹ In this sense, it accords with the purpose of the ILC Draft Articles to respond to disasters in a manner that meets the needs of affected persons.

However, assessing a state's capacity or willingness to respond to a natural disaster on its territory without clear evidence can be unpredictable. It has been argued that unless an affected state was 'in receipt of ongoing international aid immediately prior to a disaster ... intuition and anecdote are in play'.¹¹² In other words, relying on pre-emptive criteria of incapacity or unwillingness could lead to ad hoc and politicised assertions that the affected state is acting arbitrarily. While this is a valid criticism, it is not insurmountable.

The 2010 earthquake in Haiti provides the 'paradigmatic' example of when a state is *known* to have insufficient disaster response capacity.¹¹³ There was no need for guesswork or speculation as to the need for international assistance and therefore the label of arbitrariness would easily have been applied had the Haitian government refused aid on the basis that it determined the disaster to be within its domestic capacity. Save such manifest examples, however, evidence of hardship suffered is necessary to disprove an affected state's assessment of its own disaster response capabilities.

Pre-emptive assertions of an affected state's *unwillingness* present even greater possibility for conjecture. Many commentators have noted this criterion's equivalence to the common law notion of *mens rea*, in that the international community is effectively being asked to investigate the subjective disposition or 'mental state' of the government in responding to a disaster.¹¹⁴ Notwithstanding the clear evidentiary hurdles and subjectivity of this approach, Brenton Heath proposes that the following indicia could be objectively applied to determine the unwillingness of a disaster-affected state to respond:

- (a) [T]here is a regular failure on the part of the [affected] state to deliver humanitarian aid, development aid, or social services to a particular geographic area, or to a particular gender, ethnic or political group, or religious sect; (b) there has been unjustified delay in delivery of assistance which in the circumstances is inconsistent with an attempt to meet the needs of the affected population; and (c) assistance is not being delivered in accordance with internationally recognized principles of humanity, neutrality, impartiality, and non-discrimination.¹¹⁵

¹¹¹ Ibid 464.

¹¹² Allan and O'Donnell, 'An Offer You Cannot Refuse', above n 73, 56.

¹¹³ Heath, above n 6, 473.

¹¹⁴ Ibid 464.

¹¹⁵ Ibid 473.

Manifest unwillingness to respond to a disaster on a state's own territory is not uncommon.¹¹⁶ However, without objective criteria against which to judge 'unwillingness', the international community would be forced to wait until human suffering had reached a particular magnitude, or until the affected state publicly acknowledged the extent of the disaster, before it could assert that the affected state is arbitrarily refusing international disaster relief. Thus, while the affected state retains the right to determine its own disaster response capacity, the label of arbitrariness should be applied where it is *manifestly* unwilling to respond to the needs of disaster victims on its territory.

2 *When the Affected State Has Received Sufficient Assistance Elsewhere*

A disaster-affected state is almost invariably in the best position to determine the extent of a disaster as well as the type and source of assistance required. The ability to choose between the offers of assistance it receives is therefore part of its sovereign right to control the provision of international disaster relief on its territory.¹¹⁷ Providing that the accepted offer is sufficient to meet the needs of affected persons, subsequent refusals will logically escape the definition of arbitrariness. The threshold for what constitutes 'sufficient' international assistance should again be at the discretion of the affected state until contrary evidence of human suffering becomes apparent.

Accordingly, the obligation not to arbitrarily refuse international disaster relief does not prejudice an affected state's preference for regional solutions. This is particularly pertinent given that many commentators cite the less confrontational and more inclusive approach of the Association of Southeast Asian Nations states towards Myanmar as the catalyst for convincing the regime to open its borders to some forms of humanitarian assistance.¹¹⁸ Had the regime sought and accepted sufficient disaster relief from its regional neighbours in the first place, a blanket refusal of all other offers of assistance would have been justified.

3 *When the Offer of Assistance Is Not Extended in accordance with the Principles of Humanity, Impartiality and Neutrality*

ILC draft art 7 states that international disaster relief 'shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination'. Consequently, when an offer of assistance does not comply with these principles, the affected state may justifiably refuse.

Restricting the provision of international assistance to standards of humanitarianism is well recognised in the context of international humanitarian law. However, there has been a shift in emphasis from an objective, factual

¹¹⁶ The floods in East Pakistan (1970), the Ethiopian famine and cholera epidemic (1973), the North Korean famine (1997) and of course Cyclone Nargis stand out as some of the most noticeable examples in recent history, but they are not isolated instances. See the study by Travis Nelson in which he notes that disaster refusals generally are undercounted due to a lack of public reporting: Nelson, above n 70, 388. This would be especially true in assessing 'unwillingness' as it is somewhat a vague concept with varying degrees of severity, wherein a state's reluctance to respond adequately to the needs of disaster victims might go unnoticed.

¹¹⁷ *Eduardo Valencia-Ospina Fifth Report*, UN Doc A/CN.4/652, 10 [30].

¹¹⁸ Renshaw, above n 74, 180–3, 189.

assessment of how aid is administered to victims, to the subjective intentions of the assisting actor. The *Geneva Conventions* and *Additional Protocols* adopt the former approach, requiring that aid be provided without discrimination *in fact*, while dismissing the subjective motives of the state or organisation offering the relief as irrelevant.¹¹⁹

In *Nicaragua*, the ICJ upheld the objective requirement that international aid ‘must be given without discrimination to all in need’, but also introduced the subjective element that its *purpose* must be in line with the practice of the ICRC; namely, to ‘alleviate human suffering’ and ‘to ensure respect for the human being’.¹²⁰ This opened the door to potential rejections of humanitarian relief for the victims of armed conflict on the basis that the assisting actor, although capable of providing aid indiscriminately, is motivated by an ulterior purpose.

In the context of international disaster relief, the ability to reject aid that contains ulterior motivations is a practical necessity. As noted by Heath and others, an armed conflict invariably contains some degree of sovereign disruption, whereas a disaster-affected state has not lost any sovereign control over its territory or people.¹²¹ It must therefore be confident that the assisting actor is impartial and non-discriminatory *before* granting entry, rather than waiting until the relief process is underway.

Once again, it is a question of threshold. To what extent does an offer of international assistance need to be politicised in order to justify the refusal of the affected state, irrespective of whether it is itself able or willing to respond to the disaster? As noted, the *Geneva Conventions* and *Additional Protocols* stipulate that aid is only referable to the factual needs of the affected population; the motivations of the assisting actor are irrelevant on the proviso that the aid is administered without discrimination. The *Bruges Resolution on Humanitarian Assistance*¹²² and the *Nicaragua* case, however, require the provision of aid to have an ‘exclusively’ humanitarian purpose, while the ILC commentary proposes that disaster relief should be ‘primarily’ humanitarian in accordance with the requirements of draft art 7 (ie impartiality, neutrality and non-discrimination).¹²³

If taken literally, the ‘exclusive’ criterion could grant the affected states with an almost unfettered discretion to refuse international disaster relief. There will invariably be *some* benign ulterior motivation for providing assistance that does not impact upon the indiscriminate distribution of aid to all victims but that is nonetheless not ‘exclusively humanitarian’, such as the desire for regional stability or hoping to ensure that the affected state remains a viable trading partner. Equally, an overly literal interpretation of the term ‘primarily’ could prevent a state from justifiably refusing international disaster relief despite the fact that the assisting actor is, for argument’s sake, 51 per cent motivated by alleviating the suffering of disaster victims and 49 per cent motivated by religious conversion.

¹¹⁹ *APII* art 18(2).

¹²⁰ *Nicaragua* [1986] ICJ 14, 125 [243].

¹²¹ Heath, above n 6, 461; Allan and O’Donnell, ‘An Offer You Cannot Refuse’, above n 73, 40.

¹²² Institut de Droit International, *L’assistance humanitaire* [Humanitarian Assistance] (Bruges Session, 2003) <<http://perma.cc/TQZ6-7UZG>>.

¹²³ *Report of the ILC Sixty-Sixth Session*, UN Doc A/69/10, 103.

To this end, the commentary to ILC draft art 7 is instructive. Although the commentary employs the potentially expansive terminology of ‘primarily’ humanitarian aid, it is qualified by the more specific requirements of impartiality, non-discrimination and neutrality.¹²⁴ Both ‘impartiality’ and ‘non-discrimination’ reflect the objective, factual approach of the *Geneva Conventions* and *Additional Protocols* that all disaster relief must be provided on the basis of need. Neutrality, meanwhile, is described as the ‘mechanism to implement the ideal of humanity’.¹²⁵ In other words, it is intended to ensure that the subjective *purpose* of providing humanitarian relief is limited to the alleviation of human suffering caused by disasters, ‘independent of any given political, religious, ethnic, or ideological context’.¹²⁶

Accordingly, a legal obligation ensuring that the provision of international disaster relief accords with the principles of humanity, neutrality, impartiality and non-discrimination provides the affected state with appropriate and legitimate means to refuse politicised aid. When combined with the affected state’s right to preference regional solutions or determine that the disaster is within its domestic response capacity, it is apparent that the obligation not to arbitrarily refuse international disaster relief does not seek to limit the sovereignty of the affected state as much as it encourages the responsible exercise of that sovereignty.

It is worth mentioning here the obvious fact that humanitarian organisations and other non-state actors providing international disaster relief would not be bound by a multilateral treaty. However, it is submitted that this does little to undermine the validity or efficacy of the proposed treaty obligation not to arbitrarily refuse international disaster relief. What is of importance is that the affected state is bound by the treaty. Consider a hypothetical situation in which an NGO has offered humanitarian assistance to a disaster-affected state. In accordance with the above discussion, the affected state would only be justified in its refusal of such assistance where:

1. The disaster was within its domestic response capacity;
2. It had already accepted sufficient assistance from another source; or
3. The offer was extended in accordance with the principles of humanity, neutrality, impartiality or on the basis of non-discrimination.

It can be seen that it is non-determinative that the NGO is not legally bound as the question of compliance to the treaty provisions and their purpose is determined beforehand by reference to the affected state’s decision to accept or refuse entry. If an NGO that has validly entered the territory of the affected state subsequently conducts itself in a manner contrary to the treaty provisions, the affected state can terminate the assistance under the treaty or, where appropriate, deal with the offending NGO under its domestic laws. The inability of the treaty to bind the NGO does not preclude it from having an effective regulatory

¹²⁴ Ibid 103–5.

¹²⁵ Ibid 104.

¹²⁶ Ibid.

operation on the NGO's provision and modality of aid, or on the corresponding actions of the affected state.¹²⁷

B *The Burden of Proof*

A necessary precondition to determining whether a decision to refuse international disaster relief is arbitrary is to require the affected state to publicly declare its reasons for refusal. This is reflected in draft art 14(3), which states: 'When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known'.

The commentary to this provision makes it clear that the phrase 'whenever possible' is meant to be interpreted strictly.¹²⁸ Failure to publicly refuse international assistance when it was objectively possible to do so would thus breach the obligatory language of draft art 14(3). Furthermore, the ILC commentary explains that in the wording of draft art 14(2) ('consent shall not be withheld arbitrarily'), the term 'withheld' implies a temporal limit.¹²⁹ An unjustified delay in responding to offers of international disaster relief may therefore also be deemed arbitrary.

Requiring the affected state to give reasons for its refusal is necessary to trigger the subsequent burdens of proof that determine whether or not the decision was arbitrary.¹³⁰ Of course, a disaster stricken state should not be expected to categorically respond to each offer of assistance it receives. In most cases, a public statement that the disaster is within the affected state's domestic response capacity or that appropriate external assistance has already been obtained would suffice to justifiably refuse all pending offers of assistance. In other situations, citing mistrust of the political or other ulterior motivations of the offering actor will discharge the affected state's initial obligation to provide reasons for its refusal.

It should be observed that while the current text of draft art 14(3) requires the less onerous obligation that the affected state 'make its decision known', the commentary to that provision makes extensive reference to the need to provide reasons.¹³¹ As noted by Heath:

When the law requires states to step into the international arena to justify their behaviour vis-à-vis their own citizens, it creates new pathways for states to be evaluated, criticized, and shamed, and for actors to be persuaded and socialized into adopting new approaches.¹³²

¹²⁷ The regulation of non-governmental organisations ('NGOs') in the provision of international disaster relief is a research topic in its own right and warrants more discussion than is permissible in this article. Some have argued for a global regulatory scheme specific to NGOs providing humanitarian assistance that would involve a process of registration and monitoring to ensure quality control and compliance with the principles of objective humanitarianism. See, eg, Fisher, above n 11.

¹²⁸ *Report of the ILC Sixty-Sixth Session*, UN Doc A/69/10, 126.

¹²⁹ *Ibid* 125.

¹³⁰ Heath, above n 6, 455–6.

¹³¹ *Report of the ILC Sixty-Sixth Session*, UN Doc A/69/10, 126.

¹³² Heath, above n 6, 474.

Accordingly, the provision of reasons ‘could have the dual effect of discouraging states from abusing their discretion, and of providing concrete grounds on which to judge the validity of a state’s refusal to cooperate’.¹³³

The requirement to provide reasons corresponds with the above argument that the affected state’s assessment of its own capacity and willingness to respond to a disaster should be *prima facie* accepted unless there is either sufficiently contradictory evidence of human suffering or manifest evidence of incapacity or unwillingness sufficient to make a pre-emptive assessment. In both cases, the burden of proof should be on the party seeking to disprove the affected state’s assertion of its own disaster response capacity.

Similarly, where the affected state is refusing aid on the basis that it is politicised or otherwise motivated by an ulterior purpose, the burden should be on the assisting actor to prove that its offer of assistance is genuinely humanitarian, neutral, impartial and non-discriminatory, regarding both the intended means of distribution and the subjective motivations behind the offer. If this largely evidentiary burden is satisfied, the onus should shift back to the affected state to prove that its suspicions of the offer and consequent refusal were reasonable in the circumstances.

It is worth noting here some of the realities in the compliance and enforcement of international law. An affected state would likely be able to manipulate almost any treaty provision to justify its refusal of international humanitarian assistance and consequently avoid legal sanction. Even if the label of arbitrariness could subsequently be applied, it would be of limited utility to the immediate needs of disaster victims. Consequently, if an affected state really wants to refuse international humanitarian assistance, a treaty will not prevent it from doing so.

However, the purpose of the proposed treaty is to prevent the state from *wanting* to refuse international disaster relief in the first place. Having outlined the political reasons why states refuse international assistance, a treaty that regulates the offering and acceptance of international disaster relief and ensures that the affected state assumes the primary role in its coordination and facilitation has the potential to change the way that states view international humanitarian assistance and thereby reduce the occurrence of arbitrary refusals. Accepting international disaster relief through the mechanisms of a multilateral treaty is likely to bolster the domestic and international political legitimacy of the affected state and prove an effective means of ensuring better state practice.

C *The Right of the Affected State to Unilaterally Terminate International Disaster Relief*

With respect to the termination of international disaster relief, ILC draft art 19 requires that the affected state provide appropriate notification of an intention to terminate and engage in consultation with the assisting state and any other relevant actor. The IFRC has also expressed its support for the proposal that termination be reached by negotiation, noting that there is significant international and domestic political pressure on the government of the affected state to declare that the emergency is over, and that as a result, termination can

¹³³ Ibid 458.

be premature and damaging to the relief effort.¹³⁴ Accordingly, the IFRC recommends compulsory notification and consultation as a prerequisite to termination of both the ‘initial disaster relief’ (emergency) phase and the ‘disaster recovery’ phase respectively. This is argued to ensure that the winding up of international assistance occurs gradually and systematically so as not to interrupt or exacerbate ongoing operations.¹³⁵

The position taken by the ILC and IFRC is the best way to ensure that the needs of disaster victims are awarded the highest priority. However, while there are genuine humanitarian concerns in allowing the affected state to unilaterally determine that aid is no longer necessary or workable, such as the premature termination of international aid during the famine in North Korea in 1997, it is impractical to expect states to sign up to a multilateral treaty facilitating international aid that does not permit them ultimate sovereign control once international actors are within their borders. Compulsory negotiation and notification of an intention to terminate should therefore apply without prejudice to the affected state’s right to unilaterally terminate international assistance at will.

It should be noted that this is not a great departure from the existing text of ILC draft art 19 — the ability of the affected state to terminate international assistance is still subject to the requirements of notification and consultation. The only salient difference in the proposed treaty provision is that it should explicitly reference the affected state’s right to *unilateral* termination so that, although the process must be conducted safely through negotiation and over an appropriate timescale, there is no requirement that such negotiation be successful in order for the affected state’s termination to be valid.¹³⁶ It is submitted that this would help maintain an appropriate balance between the rights of disaster victims and the territorial integrity of the affected state.

D *The Consequences of Breach*

During the Special Rapporteur’s meetings with the Sixth Committee, only one state delegation expressed support for the possibility that forcible humanitarian intervention could be an appropriate response to a situation in which the affected state is unable or unwilling to respond to the disaster.¹³⁷ The overwhelming consensus was that military action would almost invariably exacerbate a disaster situation, with the then Secretary-General Kofi Annan stating that ‘to try to

¹³⁴ *Model Act*, above n 24, 71.

¹³⁵ *Ibid.*

¹³⁶ Similar concerns were raised at the *Report of the Expert Meeting*, in which several attendees expressed a preference for an alternate wording to draft art 19 that more clearly acknowledged the territorial integrity of the affected state: *Report of the Expert Meeting*, above n 29, 77–9. One proposal was to adopt the wording used in the *Tampere Convention*, which reads:

The requesting State Party may, at any time, terminate telecommunication assistance received or provided under Article 4 by providing notification in writing. Upon such notification, the States Parties shall consult with each other to provide for the proper and expeditious conclusion of the assistance, bearing in mind the impact of such termination on the risk to human life and ongoing disaster relief operations.

Tampere Convention art 6(1).

¹³⁷ See *Summary Record of the 21st Meeting*, UN GAOR, 64th sess, 21st mtg, Agenda Item 81, UN Doc A/C.6/64/SR.21 (22 December 2009) 11 [76].

extend [R2P] to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility'.¹³⁸

Notwithstanding, there remain numerous commentators in support of R2P's application to natural disasters. The most persuasive arguments note that the doctrine does not need to be extended in order to apply to disaster situations because, in extreme circumstances, the failure to respond to the needs of disaster victims would constitute a crime against humanity by way of omission, thereby triggering the potential application of R2P.¹³⁹ As argued by Jarrod Wong, this conception does not extend the existing boundaries of the doctrine and therefore ought to be an anticipated possibility.¹⁴⁰

However, the foregoing analysis on the politics of aid refusals demonstrates that the mere potential for international intervention, whether real or imagined, is a significant factor in predetermining the reluctance of affected states to accept offers of international disaster relief. A multilateral treaty must therefore explicitly exclude the possibility of delivering such assistance by force so that under no circumstances whatsoever is the territorial integrity of the affected state under threat. A provision of this nature would go a long way in highlighting that the main purpose of the obligation not to arbitrarily refuse international disaster relief is to provide the means for better state practice, not to punish or compel. While Wong and others might be theoretically correct in arguing that a natural disaster need not be a new category for the application of R2P, it is submitted that consciously excluding R2P's applicability to natural disasters is nonetheless more beneficial to the development of international disaster law as it highlights the principle that the best way to encourage better state practice and protect the rights of disaster victims is through the positive promotion of responsible sovereignty, not through the threat of intervention.

Meanwhile, economic or spontaneous political sanctions would be equally inappropriate and run the risk of further isolating the affected state and reducing the likelihood of a diplomatic solution. The most suitable consequence would therefore be for the arbitrary refusal to be condemned as an internationally wrongful act.¹⁴¹ This would pressure the affected state to reconsider its position in the face of strong diplomatic pressure and would provide for post facto reparations to persons affected by the illegitimacy of its actions. As the commission of an internationally wrongful act itself has the potential to sour diplomatic relations, the measure would have to be structured so as to apply without prejudice to the possibility of an immediate political resolution, whether regional or international. Again, this is consistent with the overall purpose of the ILC Draft Articles in prioritising the rights and needs of disaster victims above political point scoring.

In light of the preceding discussion, the following is proposed as a draft treaty provision for the obligation not to arbitrarily refuse international disaster relief. It

¹³⁸ *Implementing the Responsibility to Protect — Report of the Secretary-General*, 63rd sess, Agenda Items 44 and 107, UN Doc A/63/677 (12 January 2009) 8 [10(b)].

¹³⁹ Jarrod Wong, 'Reconstructing the Responsibility to Protect in the Wake of Cyclones and Separatism' (2009) 84 *Tulane Law Review* 219, 222–3; Ford, above n 9, 243.

¹⁴⁰ Wong, above n 139.

¹⁴¹ Heath, above n 6, 475.

is presented as an amended form of ILC draft arts 14 and 19 and builds on the previously quoted suggestion by Heath.

Article 14 — Consent of the Affected State

1. The provision of external assistance requires the consent of the affected state.
2. Consent to external assistance shall not be withheld arbitrarily.
3. A refusal of external assistance will not be arbitrary when:
 - (a) The affected state is itself able and willing to respond to the needs of disaster victims in a prompt and effective manner; or
 - (b) The affected state has received sufficient external assistance elsewhere; or
 - (c) The offer of external assistance has not been extended in accordance with the principles of humanity, neutrality, impartiality or on the basis of non-discrimination.
4. The affected state's assessment that its refusal of external assistance is not arbitrary in accordance with sub-section 3 shall be prima facie accepted unless there is sufficient evidence to the contrary.
5. Whenever possible and as soon as practicable, the affected state shall make known its decision to refuse external assistance and shall provide a reason for its refusal in accordance with sub-section 3.
6. The affected state retains the right to unilaterally terminate all external assistance and to ensure that all external actors leave the territory of the affected state as soon as is practicable and in a manner that is safe and appropriate in the circumstances.
 - (a) Notwithstanding, the affected state, the assisting state and any other relevant actor are under an obligation to provide reasonable notification of an intention to terminate the provision of external assistance and to negotiate the terms and modalities of such termination.
7. Nothing under this treaty authorises external assistance to be delivered without the consent of the affected state. The maximum penalty for any contravention of this treaty is to have the breach condemned as an internationally wrongful act.

VI COMPLIANCE MECHANISMS

A *Improving Compliance from the Ground Up*

This article has argued, from both a theoretical and a practical perspective, that an obligation not to arbitrarily refuse international disaster relief can be expressed in a manner that meets the needs of affected persons and promotes the sovereignty of the affected state. By explicitly recognising the right to self-governance and control in the acceptance and facilitation of international aid, states are more likely to regard ratification and compliance with the proposed treaty as aligning with their national interest. However, a multilateral treaty must equally be a practical response to the economic realities of the law of international disaster relief by addressing the unpredictability of international

humanitarian will and the limited capacity of many states to coordinate and facilitate international relief efforts.¹⁴²

To this end, a multilateral treaty on the protection of persons in the event of disasters should require the domestic implementation of various capacity building and regulatory compliance mechanisms. Using the IFRC *Model Act* as a guide, this Part provides a non-exhaustive list of the types of compulsory domestic legislative changes that would help give effect to the purpose of the treaty and improve compliance with the obligation not to arbitrarily refuse international disaster relief.

1 *Determining Whether the Disaster is within the Domestic Response Capacity*

It will be recalled that a refusal of international disaster relief will not be arbitrary where the affected state is itself able and willing to respond to the disaster in a prompt and effective manner. In the proposed treaty provision, it is argued that the determination by the affected state of whether the disaster is within its domestic response capacity should be prima facie accepted until contrary evidence of human suffering becomes apparent. The implementation of domestic compliance mechanisms would seek to ensure that this assessment is undertaken in good faith through a series of checks and balances.

The IFRC *Model Act* suggests that states should appoint a national disaster management authority to act as the focal point for the facilitation of international aid.¹⁴³ Prior to or immediately after the onset of a disaster, this authority should be responsible for making a rapid assessment of whether the domestic response team is capable of meeting the needs of affected persons. The *Model Act* notes that while numerous states have a designated body to assess the extent of damage and projected loss, few correlate this to an early determination of the need for international assistance.¹⁴⁴ Installing a procedure where disaster response needs are crosschecked against the known disaster response capacity of the affected state increases the likelihood of compliance with the obligation to determine the extent of a disaster in good faith. Furthermore, where the report indicates that domestic capacity is likely to be exceeded, the relevant head of state would be directed to seek or accept offers of international assistance as a matter of course.¹⁴⁵

The benefits of such mechanisms are not limited to developing countries. Kentaro Nishimoto notes that the main reason for Japan refusing international assistance following the 1995 earthquake in Kobe was that those in charge of the disaster response had simply not anticipated the need, and that to accept

¹⁴² It should be noted here that Disaster Risk Reduction ('DRR') is a primary objective of the ILC's project on the Protection of Persons in the Event of Disasters and is reflected in draft art 11. Improving compliance with DRR would be essential to fulfilling the purpose of a multilateral treaty on international disaster relief, especially because the number of casualties resulting from a disaster is directly correlated with the extent of development in the affected state. See Anastasia Telesetsky, 'Conclusion' in David D Caron, Michael J Kelly and Anastasia Telesetsky (eds), *The International Law of Disaster Relief* (Cambridge University Press, 2014) 361, 363–4.

¹⁴³ *Model Act*, above n 24, 65.

¹⁴⁴ *Ibid* 75–6.

¹⁴⁵ *Ibid* 20.

international assistance at such a late stage ‘was perceived to be more burdensome than beneficial’.¹⁴⁶ When it became apparent that Japan’s domestic capacity was overwhelmed in certain areas, it was forced to set up ad hoc mechanisms and controls for the facilitation of international relief that proved costly and inefficient.¹⁴⁷ Japan has subsequently introduced domestic measures to ensure that the facilitation of international disaster relief is a key function of its disaster response inventory.¹⁴⁸

Procedural requirements also help overcome fears that seeking international disaster relief will be perceived as political weakness. Where the decision to seek or accept international aid is formalised, the facilitation of international disaster relief becomes part of the norm and demonstrates competency in international diplomacy. As advocated by the IFRC *Model Act*, this process overcomes the legal and political consequences of having international disaster relief contingent upon the declaration of a national emergency.¹⁴⁹

2 *Facilitating the Provision of International Disaster Relief*

Once the international relief effort is on foot, the national disaster management body should have the legal authority to act as a ‘central focal point agency’ for liaising between the affected state and assisting actors.¹⁵⁰ Its responsibilities should include informing external actors of their rights and obligations while on the territory of the affected state, both with respect to the provision of international disaster relief under the treaty and compliance with domestic law generally.¹⁵¹

In the words of the IFRC *Model Act*, the disaster management authority should establish a ‘Taskforce on International Disaster Assistance Preparedness’ (‘the Taskforce’) to improve domestic capacity to facilitate international relief through research and information sharing, technical assistance, training and suggestions for future development.¹⁵² As a domestic compliance mechanism under a multilateral treaty, the Taskforce’s responsibilities could be expanded to the international or regional sharing of ideas, technical assistance and training. National contact points and regular meetings could be set up under the treaty body to ensure member states have the appropriate legal systems and

¹⁴⁶ Kentaro Nishimoto, ‘The Role of International Organizations in Disaster Response: A Case Study of Recent Earthquakes in Japan’ in David D Caron, Michael J Kelly and Anastasia Telesetsky (eds), *The International Law of Disaster Relief* (Cambridge University Press, 2014) 295, 305.

¹⁴⁷ *Ibid* 306.

¹⁴⁸ *Ibid* 307.

¹⁴⁹ *Model Act*, above n 24, 67.

¹⁵⁰ *Ibid* 24.

¹⁵¹ *Ibid*.

¹⁵² *Ibid* 25–6.

infrastructure to facilitate and incorporate international actors into the overall relief effort.¹⁵³

3 *Monitoring and Regulation of Assisting Actors*

The commentary to the ILC Draft Articles states that a refusal of international assistance would be justified where the offer is not extended in accordance with the principles of humanity, neutrality, impartiality or on the basis of non-discrimination. This paper has argued that this qualification should be reflected in the text of a multilateral treaty. However, a disaster-affected state must also be in a position to ensure that the provision of international disaster assistance, once accepted, continues to be delivered in a manner that is indiscriminate, politically neutral and not motivated by private commercial gain or other factors irrelevant to meeting the needs of disaster victims.

Again, the IFRC *Model Act* provides a useful analogy for how domestic legislative reform can improve implementation of and compliance with the treaty obligation. In obtaining the consent of the affected state to provide international disaster relief, the assisting actor should be informed of the specific type of assistance that is required.¹⁵⁴ In addition to limiting the occurrence of unwanted and inappropriate aid, this procedural requirement would also help to limit instances of duplication and waste. Having already made a needs-based assessment of the damage and projected loss caused by the disaster, the disaster management agency would be in a position to articulate its limitations and needs.¹⁵⁵

From there, the assisting actor should be required to report to the central disaster management authority on its method and progress within the overall disaster relief effort.¹⁵⁶ This requirement would not be overly cumbersome, as the assisting actor will already be working under the primary control of the affected state and therefore be in a position to receive information, instruction and provide feedback. Where feasible, routine inspection of the disaster relief process could also be incorporated to encourage compliance with the treaty obligations on both sides.

Non-compliance on behalf of the assisting actor should be met with a formal process of conciliation. It should require explanation for the breach, the opportunity to correct the behaviour within a specified time period and, finally, revocation of registration and withdrawal of the affected state's consent to participate in the relief effort where conciliation has failed.¹⁵⁷ The combination of procedural requirements, reporting regulations, supervision and negative sanctions provides an effective mechanism for ensuring that the provision of

¹⁵³ Although outside the scope of this article, it should be noted here that the requirement for the domestic legal system to accommodate assisting actors and facilitate the provision of international disaster relief is primarily a response to well-known difficulties of coordination. The ILC and the International Federation of Red Cross and Red Crescent Societies have both sought to address this issue, calling for domestic legislative measures to provide specific exception to international work permits, visas, custom requirements, tariffs, taxation and other regulations during the disaster relief period.

¹⁵⁴ *Model Act*, above n 24, 21.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid* 27.

¹⁵⁷ *Ibid* 46.

international disaster relief accords to the principles of humanity. In the international arena where enforcement mechanisms are comparatively weak, the impact that non-compliance will have on the offending state's reputation, legitimacy and ability to engage in future agreements works as an effective deterrent of potential violations.¹⁵⁸

It is submitted that these mechanisms will improve compliance with the obligation not to arbitrarily refuse international disaster relief. In the knowledge that there is a system in place to coordinate and supervise assisting actors, fears of politically motivated assistance are likely to subside and the government of the affected state can focus on accepting aid that most meets the needs of affected persons and best complements its domestic response.

B International Oversight

UN General Assembly *Resolution 68/268* requests that the Secretary-General, through the Office of the High Commissioner, support states 'in building the capacity to implement their treaty obligations and to provide in this regard advisory services, technical assistance and capacity-building'.¹⁵⁹ As a means of achieving this objective, *Resolution 68/268* suggests several of the compliance mechanisms previously mentioned in this article, such as the appointment of a central officer, inter-state cooperation in the sharing of information, technical assistance and training and routine reporting and sharing of experiences in order to encourage better state practice.¹⁶⁰ Although *Resolution 68/268* is specifically directed at encouraging states to comply with their international human rights treaty obligations, its principles and objectives are equally applicable to the context of implementing a treaty that regulates the provision of international disaster relief.

Focusing primarily on the human rights aspects of the ILC Draft Articles, Dug Cubie argues that systematic international oversight within the existing legal framework would greatly improve domestic compliance.¹⁶¹ He argues that top-down legal accountability measures are particularly appropriate in the context of natural disasters given the involvement of international state and non-state actors and the inherent potential for large-scale internal and external displacement.¹⁶² To this end, he proposes that states' disaster preparedness and response capabilities should be included in the work of the Universal Periodic Review, a UN procedure that monitors state compliance with human rights treaties, so that the process of review and quality control is undertaken on an objective, independent and multifactorial basis, thereby protecting the rights of potential disaster victims irrespective of whether the state in question is a

¹⁵⁸ Andrew T Guzman, 'A Compliance-Based Theory of International Law' (2002) 90 *California Law Review* 1823, 1849.

¹⁵⁹ *Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System*, GA Res 68/268, UN GAOR, 68th sess, 81st plen mtg, Agenda Item 125, UN Doc A/RES/68/268 (21 April 2014, adopted 9 April 2014) para 17.

¹⁶⁰ *Ibid.*

¹⁶¹ Dug Cubie and Marlies Hesselman, 'Accountability for the Human Rights Implications of Natural Disasters: A Proposal for Systemic International Oversight' (2015) 33 *Netherlands Quarterly of Human Rights* 9.

¹⁶² *Ibid.* 22.

signatory to relevant international human rights treaties.¹⁶³ To complement this process, Cubie suggests that the UN could appoint an Independent Expert or Special Rapporteur on the Human Rights Implications of Disasters to ensure that compliance with the obligation to protect persons in the event of disasters is encouraged and facilitated to the same extent as other human rights obligations.¹⁶⁴

It is submitted that such international oversight would complement the implementation of domestic compliance mechanisms in improving the willingness and capacity of affected states to respond to the needs of disaster victims in a prompt and effective manner. Specific to the obligation not to arbitrarily refuse international disaster relief, it would bolster the affected state's ability to accurately determine the extent of its disaster response capacity as well as its ability to facilitate and regulate the provision of disaster relief on its territory.

VII CONCLUSION

This article has argued for the ILC Draft Articles to be convened in a multilateral treaty that obliges states not to arbitrarily refuse international disaster relief. The suffering caused by the Myanmar military regime in its decision to preference political power over the needs of disaster victims demonstrates the fallacy that addressing or disregarding human rights violations is the sole dominion of the offending state. International law must work towards ensuring the protection of disaster victims anywhere in the world.

However, the disorganised state of international disaster law means that there are no legal assurances that aid will be delivered in accordance with the principles of humanity and neutrality and therefore no guarantee that the sovereignty and territorial integrity of the affected state will be respected. The lack of a codified system means that seeking international aid is ad hoc and liable to be perceived as an admission of political incompetence.

In order to overcome these perceptions, the obligation not to arbitrarily refuse international disaster relief must be contained in a multilateral treaty that is founded on the principles of sovereign equality and territorial integrity. This article has demonstrated how such a treaty provision could work in practice to bring legal surety to the acceptance, facilitation and termination of international disaster relief, thereby helping to quash fears that the affected state is at risk of losing sovereign control or domestic political legitimacy in the face of international humanitarian assistance. First, the obligation must be legally binding to avoid replicating the existing instruments of soft law and to ensure that the human rights contained within the treaty are not devalued. Secondly, it must be a response to the political fears that currently influence aid refusal by incorporating the provisions previously mentioned: (1) that a refusal will not be arbitrary where the affected state is itself able and willing to respond to the disaster, where it has received sufficient assistance elsewhere or where the offer is not extended in accordance with the principles of humanity; (2) that the burden is on the assisting actor to prove that a refusal was arbitrary; (3) that the affected

¹⁶³ Ibid 35–6.

¹⁶⁴ Ibid.

state retains the right to unilateral termination; and (4) that the consequences for arbitrarily refusing aid are limited to the commission of an internationally wrongful act. Finally, it must include various compliance mechanisms to improve states' ability to accept, facilitate and coordinate international assistance.

Every state has a sovereign duty to protect the lives of disaster victims on its territory. By codifying an obligation not to arbitrarily refuse international disaster relief in a multilateral treaty, an affected state will be able to fulfil this duty through international cooperation without compromising its sovereign right to self-governance and territorial integrity.